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KOPERASI PERMODALAN FELDA MALAYSIA BHD v. AL RAWDA INVESTMENT FOR REAL ESTATE DEVELOPMENT & PROJECTS MANAGEMENT CO LTD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
KHADIJAH IDRIS J
B [SUIT NO: WA-22M-96-02-2019]
31 DECEMBER 2019

CIVIL PROCEDURE: *Setting aside – Application for – Application to set aside ex parte order for leave to serve notice of writ to be served out of jurisdiction, writ of summons and statement of claim – Whether cause papers effected on defendants in accordance with and not contrary to law of Saudi Arabia – Whether service of cause papers duly effected – Whether there was non-disclosure of arbitration agreement clause when making application for leave to serve writ outside of jurisdiction – Whether ex parte order ought to be set aside*

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CIVIL PROCEDURE: *Service – Service out of jurisdiction – Ex parte order for leave to serve notice of writ to be served out of jurisdiction, writ of summons and statement of claim – Application to set aside – Whether cause papers effected on defendants in accordance with and not contrary to law of Saudi Arabia – Whether service of cause papers duly effected – Whether service ought to be set aside – Rules of Court 2012, O. 11 r. 5(1), (2), & (3) & O. 11 r. 6(2)*

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ARBITRATION: *Contract – Disputes – Whether agreements contained arbitration clause – Whether court right forum to hear dispute between parties – Whether there was non-disclosure of arbitration agreement clause when making application for leave to serve writ outside of jurisdiction – Whether submission to court jurisdiction clause in agreement negated arbitration agreement clause – Whether there was dispute between parties in context of arbitration agreement clause – Whether arbitration agreement inoperative or incapable of being performed – Whether dispute ought to be referred to arbitration – Arbitration Act 2005, ss. 10 & 11*

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The plaintiff was a cooperative society established in Malaysia while the first defendant was a foreign limited liability company incorporated in the Kingdom of Saudi Arabia. The second defendant was an individual and a citizen of the Kingdom of Saudi Arabia and the chairman and chief executive officer of the first defendant company. The first defendant and the second defendant represented to the plaintiff that the first defendant was the lessee of Hotel Umm Al-Qura ('hotel') located at Makkah. The first defendant was represented to be a real estate and hotel management company established in the Kingdom of Saudi Arabia. At the request of the first defendant, the plaintiff granted to the first defendant a commodity *murabahah* facility ('facility') based on the Shariah concept of *tawarruq* a sum of Saudi Riyal One Hundred Sixty Million (SR160,000,000). Pursuant thereto, the parties entered into a commodity *murabahah* facility agreement ('*murabahah*

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facility') for the purpose of the first defendant's working capital requirements for a tenure of nine *hajiri* years and four and a half months subject to terms and conditions of the *murabahah* facility. At the same time, the plaintiff and the second defendant entered into a personal guarantee and indemnity agreement ('personal guarantee agreement') wherein the second defendant irrevocably and unconditionally guaranteed all the repayment obligations of the first defendant under the *murabahah* facility. Subsequently, the plaintiff and the first defendant entered into a collaboration agreement ('collaboration agreement') for the purpose and in retaliation to the management and operation of the hotel for mutual benefit of the plaintiff and the first defendant subject to the terms and conditions stated therein. The first defendant, however, failed to comply with certain clauses of the *murabahah* facility, and was in arrears of payment. *Via* this instant action, the plaintiff claimed, *inter alia*, against the first defendant the total sum of SR151,013,415 and against the second defendant the total sum of SR151,013,415 and a declaration that the plaintiff was entitled to enforce the indebtedness in the said amount as against the properties owned by the second defendant. The plaintiff filed an *ex parte* application for leave ('application for leave') to serve notice of writ to be served out of jurisdiction, writ of summons and statement of claim, which was allowed by the Deputy Registrar ('*ex parte* order'). *Vide* encl. 16, the defendants filed for a setting aside application and submitted, *inter alia* (i) there was an arbitration agreement clause in the *murabahah* facility, personal guarantee agreement and collaboration agreement and as such, this court was not the right forum to hear the dispute between the parties as it had no jurisdiction to do so; (ii) the said facts were not disclosed by the plaintiff when the plaintiff made their application for leave to serve the writ outside of jurisdiction; and (iii) service of the notice of writ to be served out of jurisdiction on the defendants was bad and should be set aside as there was no statement in the affidavit of service that service on the defendants were effected legally in accordance with the prevailing laws in Saudi Arabia. The issues that arose were (i) whether there was non-disclosure of the arbitration agreement clause; (ii) whether service of the notice of writ to be served out of jurisdiction, writ of summons and statement of claim ought to be set aside; (iii) whether this court had jurisdiction; (iv) whether the submission to the court jurisdiction clause negated the arbitration agreement clause; (v) whether there was a dispute between the parties in the context of the arbitration agreement clause; and (vi) whether the arbitration agreement was inoperative or incapable of being performed.

Held (setting aside *ex parte* order; dispute in action to be referred to arbitration):

(1) The plaintiff raised a preliminary objection in respect of the deponent's affidavit ('deponent's affidavit') and argued that it was null and defective and should be expunged because the deponent, being a member of Bar Council Malaysia, had explicitly flouted r. 28 of the Legal Profession

(Practice and Etiquette) Rules 1978 as the defendant's application involved disputed questions of facts and laws, which amongst others, included the plaintiff's compliance with O. 11 of the Rules of Court 2012 ('ROC') in relation to service of the relevant cause papers out of jurisdiction to the defendants based in Saudi Arabia and whether the parties were bound by commodity *murabahah* facility agreement, the personal guarantee agreement and the collaboration agreement and the governing law clause and dispute resolution clause mentioned in the aforesaid agreements. As the facts were contentious and given that facts deposed in an affidavit must be from the deponent's knowledge, the plaintiff claimed that the deponent's affidavit was defective. This court was of the view, however, that the averments made by the deponent in the deponent's affidavit essentially related to matters which were available from the cause papers filed in this instant action. The averments were substantially the facts as contained in the cause papers and repeated or highlighted in the deponent's affidavit. For the purpose of the setting aside application, the said facts were not contentious. Insofar as the legal position taken up by the defendants as averred in the said affidavit, it was premised on established legal principles, which they were entitled to do so. As there was cogent evidence that the deponent was authorised to affirm the deponent's affidavit on behalf of the defendants, the challenge to the deponent's authority to affirm the said affidavit was untenable. Further, even if r. 28 of the Legal Profession (Practice and Etiquette) Rules 1976 was applicable, there was nothing to suggest that the deponent had reasons to believe that he would be a witness in this instant action. After all, the setting aside application concerned issues of facts and law which could be disposed by way of affidavits. Even if the deponent was a potential witness, by reasons of r. 28(c), the deponent was not prevented from swearing or affirming an affidavit as to formal or undisputed facts in matters which he acted or appeared, which was the case here. Thus, this court dismissed the preliminary objection raised. (paras 19-20)

(2) It is crucially important that the court has before it all relevant and material facts in deciding whether the jurisdiction of the court ought to be invoked for the purpose of serving the writ out of its jurisdiction as it is a direct interference with the exclusive jurisdiction of a sovereign State. It was not disputed that the arbitration agreement clause was not disclosed by the plaintiff at the application for leave stage. Had the said clause been disclosed, the *ex parte* order would most probably not be granted. (paras 26 & 27)

(3) Order 11 r. 6(2) of the ROC allows service to be effected in the manner stated therein in a country where there does not subsist a Civil Procedure Convention providing for service of process of the court. The deponents in the plaintiff's affidavit of service and the agent's affidavit

of service did not affirm that in the country in which service of the cause papers is to be done, namely, Saudi Arabia, there is no Civil Procedure Convention which governs service of process of the court and that the service was in accordance with O. 11 r. 6(2)(b)(ii) of the ROC. There were no averments made by the plaintiff that service of the cause papers that was effected on both the defendants was in accordance with and not contrary to the laws of Saudi Arabia (see O. 11 rr. 5(1) to (3) of the ROC). Judicial power of one State could not be extended or exercised in another independent State except with the consent of that State. By extension, the laws of the State (governing service of process of the court) in which service was to be effected must be strictly complied with. Thus, there was no cogent evidence that the cause papers were duly served on the defendants in accordance with the laws of Saudi Arabia. As such, there was no cogent evidence that service of cause papers were duly effected and this court was compelled to set aside service of the same. As a consequential order, it was declared that notice of writ to be served out of jurisdiction, writ of summons and statement of claim were not served on the first defendant and the second defendant. (paras 32-34)

(4) Reading the arbitration agreement clause in totality, the word 'may' qualified the parties' option either to pursue the dispute if the parties could not resolve the dispute or not to proceed further, that was, the parties may choose to live with the dispute. By the word 'may', in the event any of the party chooses to pursue the dispute, the party is contractually bound to resolve the dispute by way of arbitration and not through litigation. Accordingly, even though the word 'may' is used in the arbitration agreement clause, on the facts, the arbitration agreement was intended to be construed as mandatory and not merely directive. Under s. 10 of the Arbitration Act 2005, it is now mandatory on the court to grant a stay where the matter before it is the subject of an arbitration agreement unless the arbitration agreement is null and void, inoperative or incapable of being performed. The approach of the court with regards to arbitration agreement is to hold the parties to their voluntary and consensus to arbitrate their dispute especially so when the agreement to arbitrate is clear and certain. On the true construction of the arbitration agreement clause, it was clear that in the event the parties failed to settle the dispute, controversy and claim with reasonable commercial endeavours and decided to pursue the dispute, controversy and claim further, the parties had consciously consented to resolve the said dispute by way of arbitration. The plaintiff was accordingly obliged to refer the dispute to arbitration. (paras 44, 46 & 48)

(5) While the submission to the court jurisdiction clause was clearly and expressly stated in the *murabahah* facility and the collaboration agreement, there was no such clause found in the personal guarantee agreement. Clause 11 of the personal guarantee agreement is the governing law clause which merely incorporates the parties' agreement for the laws of Malaysia to be the governing law of the personal guarantee agreement. Thus, the issue whether the submission to the court jurisdiction clause negated the arbitration agreement was not relevant to the personal guarantee agreement. Having considered the arbitration agreement clause and the submission to the court jurisdiction clause, both the said provisions were able to function harmoniously in order to give effect to the intention of the parties to arbitrate their dispute and whenever the need arises, to seek the court assistance for, among others, any of the interim measures stated in s. 11 of the Arbitration Act 2005. (paras 52 & 55)

(6) Under s. 10 of the Arbitration Act 2005, this court was not required to critically examine the facts in order to determine whether there was a dispute, claim or controversy within the context of the arbitration agreement clause. Accordingly, the dispute or claim as to the defendants' admission on their repayment obligation in relation to the arrears due to the plaintiff and/or the defendants' claim that the *murabahah* facility agreement, personal guarantee agreement and collaboration agreement contravened the laws and/or regulation in Saudi Arabia was a matter to be determined by the arbitral tribunal. (para 63)

(7) Under the arbitration agreement clause, the parties agreed that reference to any dispute, controversy or claim to the GCC Commercial Arbitration Centre in Bahrain shall be deemed to be a submission to arbitration within the meaning of the International Commercial Arbitration Law (Decree No. 9 of 1994) which had already been abrogated. The plaintiff's allegation that there would be no governing rules to regulate the impasse of any disagreement in respect of the appointment of arbitrators between the parties (because the International Commercial Arbitration Law promulgated by Decree No. 9 of 1994 was repealed) was simply misleading. While it was true that the International Commercial Arbitration Law promulgated by Decree No. 9 of 1994 was abrogated (by the Bahrain Arbitration Law No. 9/2015), it was readily replaced with the UNCITRAL 1985 Model Law on International Commercial Arbitration ('the UNCITRAL Law') which governed arbitration that takes place in Bahrain. Accordingly, the plaintiff's contentions that the arbitration agreement was inoperative or incapable of being performed was unfounded and untenable. It was

absurd to even think for a moment that the International Commercial Arbitration Law promulgated by Decree 9 of 1994 was repealed without a new law to substitute it when it involved international commercial arbitration where international parties consented and opted for Bahrain to be the appropriate jurisdiction for the purpose of resolving their commercial disputes, just like the plaintiff and the defendants in this instant action. (paras 64, 65 & 68)

Case(s) referred to:
"The Hagen" [1908] P 189 ***(refd)***
Bauer (Malaysia) Sdn Bhd v. Daewoo Corporation [1999] 4 CLJ 665 CA ***(refd)***
Cantrans Services (1965) Ltd v. Clifford [1974] 1 LNS 14 FC ***(refd)***
Fiden Electrical Engineering Sdn Bhd v. Nippon Seiko KK & Ors [2004] 7 CLJ 12 HC ***(refd)***
Hamidah Fazilah Sdn Bhd v. Universiti Tun Hussein Onn Malaysia (UTHM) [2016] 1 LNS 1170 HC ***(refd)***
Lembaga Pelabuhan Kelang v. Kuala Dimensi Sdn Bhd & Another Appeal [2010] 9 CLJ 532 CA ***(refd)***
Malaysian Newsprint Industries Sdn Bhd v. Bechtel International Inc & Anor [2008] 1 LNS 222 HC ***(refd)***
Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Pat t/a Juta Bena [1996] 1 CLJ 231 FC ***(refd)***
TNB Fuel Services Sdn Bhd v. China National Coal Group Corp [2013] 1 LNS 288 CA ***(refd)***
Westbury Tubular (M) Sdn Bhd v. Ahmad Zaki Sdn Bhd & Ors [2001] 5 CLJ 67 HC ***(refd)***
Wood View Engineering Sdn Bhd v. Lim Chan Kwang [2006] 5 CLJ 62 HC ***(refd)***

Legislation referred to:
Arbitration Act 1952 (repealed), s. 6
Arbitration Act 2005, ss. 9, 10, 11
Legal Profession (Practice And Etiquette) Rules 1978, r. 28(c)
Rules of Court 2012, O. 11 rr. 4, 5(1), (2), (3), 6(2)(b)(ii), O. 12 r. 10(1), O. 41 r. 5
Rules of the Supreme Court 1957, O. 11 r. 1(j)

For the plaintiff - Sachpal Singh; Teng Weng Loong; M/s Radzi Sheikh Ahmad & Sachpal
For the defendants - Chetan Jethwani & Leonard D'Cruz; M/s Paul Cheah Assoc

Reported by Suhainah Wahiduddin

JUDGMENT

Khadijah Idris J:

[1] On 29 March 2019, the plaintiff's *ex parte* application for leave ("application for leave") to serve notice of writ to be served out of jurisdiction, writ of summons and statement of claim was allowed by the Deputy Registrar ("*ex parte* order").

[2] *Vide* encl. 16 ("setting aside application") the defendants sought for the following orders:

1. bahawa Perintah *Ex Parte* Mahkamah Yang Mulia ini bertarikh 29 Mac 2019 diketepikan;
2. bahawa penyampaian Notis Writ Untuk Disampaikan Di luar Bidang Kuasa bertarikh 12 April 2019 dan penyampaian Writ Saman dan Pernyataan Tuntutan dalam tindakan ini ke atas Defendan-Defendan diketepikan;
3. satu deklarasi bahawa Notis Writ Untuk Disampaikan Di luar Bidang Kuasa bertarikh 12 April 2019 dan Writ Saman dan Pernyataan Tuntutan tidak diserahkan ke atas Defendan-Defendan;

SECARA ALTERNATIF

4. bahawa prosiding-prosiding yang difailkan di sini digantung;
5. bahawa semua pertikaian yang timbul dalam guaman di sini dirujuk kepada prosiding timbangtara mengikut kontrak-kontrak di antara pihak-pihak;
6. satu deklarasi bahawa Mahkamah Yang Mulia ini dan mana-mana Mahkamah Tinggi Malaya tidak mempunyai bidang kuasa ke atas subjek perkara tuntutan Plaintif dalam tindakan ini

[3] After considering the affidavit evidence and submission of both parties, this court granted order in terms of prayers 1, 2, 3, 5 and 6. The plaintiff appealed. My reasons are set out below.

Parties

[4] The plaintiff is Koperasi Permodalan Felda Malaysia Bhd is a co-operative society established in Malaysia under the Co-operative Societies Act 1993.

[5] The defendants are:

(i) Alrawda Investment For Real Estate Development & Project Management Co Ltd ("first defendant") is a foreign limited liability company incorporated in the Kingdom of Saudi Arabia and having its registered address at No. 27, Beautat Business Park, Al-Shatei District, Kingdom of Saudi Arabia; and

(ii) Dr Mashhoor Ali Al-Madodi ("second defendant") is an individual and a citizen of the Kingdom of Saudi Arabia and the chairman and chief executive officer of the first defendant company with address at No. 27, Beautat Business Park, Al-Shatei District, P.O Box No. 11193, Kingdom of Saudi Arabia.

Plaintiff's Pleaded Case

[6] The first defendant and second defendant represented to the plaintiff that the first defendant is the lessee of a four star hotel building hotel known as Hotel Umm Al-Qura ("hotel") located at Makkah Gumaiza Quarter approximately 950m from Al Haram comprising 307 fully furnished rooms, a restaurant, private car parks and other related hotel facilities. The first defendant was represented to be a real estate and hotel management company established in the Kingdom of Saudi Arabia.

[7] At the request of the first defendant, the plaintiff granted to the first defendant a commodity *murabahah* facility ("facility") based on the Shariah concept of *tawarruq* a sum of Saudi Riyal One Hundred Sixty Million (SR160,000,000). Pursuant thereto the parties entered into a commodity *murabahah* facility agreement dated 28 June 2014 ("*murabahah* facility agreement"). The facility is for the purpose of the first defendant's working capital requirements for a tenure of nine *hajiri* years and four and half months from 28 June 2014 to 1 August 2023 subject to terms and conditions of the *murabahah* facility agreement.

[8] At the same time, the plaintiff and the second defendant entered into a personal guarantee and indemnity agreement dated 28 June 2014 ("personal guarantee agreement") wherein the second defendant irrevocably and unconditionally guarantees all the repayment obligations of the first defendant under the *murabahah* facility agreement.

[9] Subsequently, the plaintiff and first defendant entered into a collaboration agreement dated 28 June 2014 ("collaboration agreement") for the purpose and in relation to the management and operation of the hotel for mutual benefit of the plaintiff and first defendant subject to the terms and conditions stated therein.

[10] *Vide* the collaboration agreement, the plaintiff and first defendant are to formalise and set out the basic terms of their relationship with each other in the management and operation of the hotel with a view to maximise the returns from the operations of the same. As part of the agreement, there shall be established a management team comprising the hotel manager and one representative of the plaintiff, and a committee established (policies implementation committee) comprising one representative of the plaintiff and two representatives of the first defendant and other terms and conditions as agreed in the collaboration agreement, none of which the defendants performed.

[11] The relevant terms of the *murabahah* facility agreement, *inter alia*, include the following:

(i) the facility amount is Saudi Riyal One Hundred Sixty Million (SR160,000,000);

A (ii) the plaintiff's purchase price as stated in the purchase request being the equivalent of the facility amount of SR160,000,000;

(iii) the plaintiff's sale price is Saudi Riyal Two Hundred Forty Four Million (SR244,000,000) payable by the first defendant to the plaintiff on deferred payment terms as per cl. 6 of the *murabahah* facility agreement;

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(iv) pursuant to cls. 5 and 6, first defendant undertook to pay the plaintiff's sale price in the manner as set out in the facility agreement with total profits calculated for the entire tenure based on the expected internal rate of 10.3%;

C (v) pursuant to cl. 6.3, the plaintiff shall be entitled to the payment of compensation for the failure by the first defendant to make any payment on its due date or when demanded by the plaintiff at a rate of 1% per annum over the overdue amount from the due date until the date of actual payment;

D (vi) clause 11 sets out the event of default which includes, *inter alia*, the first defendant's failure to pay the plaintiff's sale price and failure to observe and perform any of its obligations under the *murabahah* facility agreement; and

E (vii) by cl. 18.9 of the *murabahah* facility agreement and cl. 11 of the personal guarantee agreement, the said agreements are governed by and shall be construed in accordance with the laws of Malaysia and the parties thereto had agreed to submit to the jurisdiction of the Malaysian courts.

[12] The first defendant has failed, refused and/or neglected to comply with cls. 6 and 11 of the *murabahah* facility agreement and is in arrears of F payment to the amount of SR151,013,415.

[13] The plaintiff eventually sent a notice dated 13 April 2018 to the first defendant declaring an event of default and terminated the *murabahah* facility agreement and formally demanded the balance of arrears of all outstanding G due and owing.

[14] Pursuant to the personal guarantee agreement, the plaintiff's solicitor sent notices to the second defendant on 30 November 2016 and 14 August 2017 demanding an appropriate action to resolve the payment for the indebtedness of the first defendant. Subsequently, a notice dated 13 April H 2018 was sent to the second defendant wherein the plaintiff terminated the *murabahah* facility agreement and demanded repayment of debt owing by the first and second defendants.

[15] *Via* this instant action, the plaintiff claims:

I (i) against the first defendant the total sum of SR151,013,415 (being the equivalent of an estimate amount of RM164,391,597.84);

(ii) against the second defendant:

(a) the total sum of SR151,013,415 (being the equivalent of an estimate amount of RM164,391,597.84); and

(b) a declaration that the plaintiff is entitled to enforce the indebtedness in the amount of SR151,013,415 (being the equivalent of an estimate amount of RM164,391,597.84) as against the following properties owned by the second defendant, namely, Alyahliya Hotel Jeddah, Kingdom of Saudi Arabia and Rauda Al Aqiq Hotel Madinah, Madinah.

(iii) against the first defendant and second defendant:

(i) judgment interest at 5% per annum based on SR151,013,415 (being the equivalent of an estimate amount of RM164,391,597.84) to be calculated from the date of the writ of summons filed herein until the date of full and final settlement of the judgment sum; and

(ii) other losses and damages to be assessed.

Setting Aside Application

[16] The defendant's contentions may be summarised as follows:

(i) there is arbitration agreement clause in the *murabahah* facility agreement, personal guarantee agreement and collaboration agreement. As such this court is not the right forum to hear the dispute between the parties as it has no jurisdiction to do so;

(ii) the said facts were not disclosed by the plaintiff when the plaintiff made their application for leave to serve the writ outside of jurisdiction;

(iii) service of the notice of writ to be served out of jurisdiction on the defendants is bad and should be set aside as there is no statement in the affidavit of service that service on the defendants was effected legally in accordance with the prevailing laws in Saudi Arabia; and

(iv) the alleged admissions in the defendants' correspondences are not admissible as they are a part of a string and/or uninterrupted series of without prejudice correspondences between the defendants and the plaintiff whereby two of the plaintiff's letters were marked "without prejudice".

[17] Whereas the plaintiff argued:

(i) based on the governing law clause, the *murabahah* facility agreement, personal guarantee agreement and collaboration agreement shall be construed in accordance with the laws of Malaysia;

(ii) Order 11 r. 4 of the Rules of Court 2012 ("ROC 2012") does not mandate for a full and frank disclosure;

(iii) under common law a prior agreement between contracting parties to refer their disputes to arbitration did not operate to bar either of them from instituting proceedings in the courts. Neither did such a clause preclude the court from entertaining a suit filed in breach of the contract to arbitrate;

(iv) any contract to oust the jurisdiction of the court is against public policy; and

(v) there is no dispute between the parties as the defendants have admitted, *via* their correspondence, on their repayment obligation in relation to the arrears due to the plaintiff. The correspondences issued by the defendants to the plaintiff which were marked as "strictly private and confidential" or not marked at all can be adduced as evidence and/or exhibited as supporting documents for this court's deliberation and such communication are not protected by privilege.

[18] The defendants' setting aside application under O. 12 r. 10(1) of the ROC 2012 is supported by two affidavits. The first affidavit encl. 17 was deposed by one Zachary Ivan Scully ("deponent"), a lawyer who is a Malaysian citizen in the employment of a Singapore law firm RHT Law TaylorWessing ("RHT Law"). RHT Law was engaged by the defendants to handle this case, and who in turn appointed Messrs Paul Cheah & Associates as the local Malaysian counsel to act for the defendants here. The second affidavit was affirmed by the second defendant (encl. 20).

Preliminary Objection

[19] At the outset, the plaintiff raised a preliminary objection in respect of the deponent's affidavit encl. 17 ("deponent's affidavit"). It is argued by the plaintiff that the deponent's affidavit is null and defective and should be expunged. The objection is premised on the following grounds:

(i) the deponent being a member of Bar Council of Malaysia (as stated in the "Memberships & Associations" from RHT's official website) is bound by Legal Profession Act 1976 and Legal Profession (Practice And Etiquette) Rules 1978. The Deponent has explicitly flouted r. 28 of the Legal Profession (Practice And Etiquette) Rules 1978 ("r. 28") as the defendant's application involves disputed questions of facts and/or mixture of questions of facts and laws, which amongst others, includes the plaintiff's compliance with O. 11 of the ROC 2012 in relation to service of the relevant cause papers out of jurisdiction to the defendants based in *Saudi Arabia* and whether the parties are bound by commodity *murabahah* facility agreement, the personal guarantee and the collaboration agreement and the governing law clause and dispute resolution clause mentioned in the aforesaid agreements. As the facts are contentious and given that facts deposed in an affidavit must be from the deponent's knowledge, the deponent's affidavit is defective;

(ii) it is further argued that the deponent was not duly authorised by the defendants to depose the deponent's affidavit; and

(iii) the defective is so serious and incurable. Thus, the fact that the deponent's affidavit is not prejudicial to the plaintiff is irrelevant.

[20] Having considered the contents of the deponent's affidavit and the submissions thereto, this court dismissed the said objections on the following grounds:

(i) the deponent averred that the matters deposed to in the deponent's affidavit are within his personal knowledge and belief and/or obtained from records to which the deponent has access. It is clear the deponent had stated his source of information and belief, which is his personal knowledge and records (see O. 41 r. 5 of the ROC 2012). Thus there is no issue on the matters deposed in the deponent's affidavit not within the deponent's personal knowledge;

(ii) the averments made by the deponent in the deponent's affidavit relate to the following matters:

(a) the setting aside application and the various prayers sought;

(b) the relevant cause papers, namely, the plaintiff's statement of claim and the commodity *murabahah* facility agreement, personal guarantee agreement and collaboration agreement (which was pleaded by the plaintiff in the statement of claim) and the identical dispute resolution and arbitration clauses in the said agreements, the setting aside application, *ex parte* order and the affidavit of service in encl. 12;

(c) the plaintiff's failure to bring to the attention of this court of the dispute resolution and arbitration clauses when they applied for leave to serve the notice of writ to be served out of jurisdiction. Thus this court lacks jurisdiction to hear this dispute and ought to be stayed pending reference to the parties' dispute to arbitration;

(d) no notice of dispute was issued by the parties in accordance with the dispute resolution clause, thus this instant action is premature and ought to be stayed or struck out;

(e) service of the notice of writ to be served out of jurisdiction on the defendants is bad as there is insufficient proof of service because no statement in the affidavit of service to suggest that service was effected in accordance with the laws prevailing in Saudi Arabia; and

(f) if the setting aside application is dismissed, seeking extension of time to file the defendants' statement of defence.

(iii) accordingly, the averments made by the deponent in the deponent's affidavit essentially relate to matters which are available from the cause papers filed in this instant action (in particular the plaintiff's statement of claim and the affidavit of service filed by the plaintiff). The averments are substantially the facts as contained in the cause papers and repeated and/or highlighted in the deponent's affidavit. For the purpose of the setting aside application, the said facts are not contentious. Insofar as the legal position taken up by the defendants as averred in the said affidavit, it is premised on established legal principles, which they are entitled to do so. Whether their legal position is meritorious or otherwise is another issue;

(iv) as pointed out by the plaintiff, the deponent did not aver that he was authorised by the defendants to affirm the deponent's affidavit. However, the second defendant *via* affidavit encl. 20 affirmed that he has authorised the deponent to affirm the deponent's affidavit on behalf of the defendants in the deponent's capacity as an employee of RHT Law being the law firm engaged by the defendants. The second defendant adopted all the averments made by the deponent in the deponent's affidavit as his own. As there is cogent evidence that the deponent was authorised to affirm the deponent's affidavit on behalf of the defendants, the challenge to the deponent's authority to affirm the said affidavit is untenable (see *Wood View Engineering Sdn Bhd v. Lim Chan Kwang* [2006] 5 CLJ 62; [2006] 3 MLJ 470). Thus r. 9(1) of the Singaporean Legal Profession (Professional Conduct) Rules 2015 which provides that a legal practitioner must not, *inter alia*, draft affidavit which contains facts or contention which is not supported by the clients is not applicable as the defendants have authorised and adopted the deponent's affidavit; and

(v) the plaintiff contends the deponent has breached r. 28 which is said to apply to the deponent as he is a practising lawyer registered with the Bar Council of Malaysia. However, this court is of the view the information obtained from RHT Law's official website (exh. SS-1 of encl. 18) is not cogent evidence of the deponent's position. Even if r. 28 is applicable, there is nothing to suggest that the deponent has reasons to believe that he will be a witness in this instant action. After all, the setting aside application concerns issues of facts and law which can be disposed of by way of affidavits. Even if the deponent is a potential witness, by reasons of r. 28(c) of the Legal Profession (Practice and Etiquette) Rules 1976, the deponent is not prevented from swearing or affirming an affidavit as to formal or undisputed facts in matters in which he acts or appears, which is the case here.

Findings Of Court

Non-disclosure Of The Arbitration Agreement Clause

[21] It is not disputed that the *murabahah* facility agreement (see cl. 18.8), the personal guarantee agreement (see cl. 10) and collaboration agreement (see cl. 6.6) has identical dispute resolution clause which reads as follows:

> **18.8 Dispute Resolution**
>
> (a) In the event of any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity thereof ("Dispute"), any party shall be entitled to serve on the other party a written notice of the Dispute ("Notice of Dispute"). The Dispute shall be settled with reasonable commercial endeavours with negotiations in good faith between the Parties within thirty (30) days from the date of the Notice of Dispute.
>
> (b) If is not resolved within thirty (30) days from the Notice of Dispute, any party **may** refer the Dispute for resolution by a board of three (3) arbitrators comprises of one (1) arbitrator to be appointed by each party and one (1) arbitrator to act as the chairman shall be nominated by the Director of GCC Commercial Arbitration Centre ("GCAC") in Bahrain and any such reference shall be deemed to be a submission to arbitration within the meaning of the International Commercial Arbitration Law (Decree No. 9 of 1994).
>
> (c) The arbitration proceedings shall be held at the office of the GCAC in Bahrain using the arbitration rules of the centre and using the facilities and system available at that centre or at such other venue within as may be mutually agreed by the parties.
>
> (d) The existence of dispute, conflict or claim and the fact that the arbitration is going on pursuant to this Agreement does not exempt the parties from the obligations contained herein. (emphasis added)

As the dispute resolution clause in the *murabahah* facility agreement, personal guarantee agreement and collaboration agreement are identical the said clauses will be referred to collectively as the "arbitration agreement clause" in the discussion below.

[22] It is the defendants' stand that pursuant to the arbitration agreement clause, the dispute which arose out of the *murabahah* facility agreement, personal guarantee agreement and corroboration agreement ought to be referred to arbitration and this court has no jurisdiction to hear the dispute between the parties. In light of the non-disclosure of the arbitration agreement clause, it is argued by the defendants that there was no sufficient material placed before this court when the *ex parte* order was made granting plaintiff leave to serve the notice of writ to be served out of jurisdiction.

[23] The plaintiff did not deny that the arbitration agreement clause was not disclosed in the application for leave. It is the plaintiff's stand that they are not required to make a full and frank disclosure.

[24] I agree with the plaintiff that there is no requirement for a full and frank disclosure under O. 11 r. 4 of the ROC 2012. However, the requirement for such disclosure was discussed in *Cantrans Services (1965) Ltd v. Clifford* [1974] 1 LNS 14; [1974] 1 MLJ 141. In the said case the appellant appealed against the decision of the High Court dismissing their application to set aside the order of the Senior Assistant Registrar granting respondent leave to issue a writ of summons against the appellants and to serve notice of the said writ outside the jurisdiction of the court. The respondent's application for leave was made pursuant to O. 11 r. 1(j) Rules of the Supreme Court 1957 ("RSC"). The Federal Court found there was non-disclosure of material facts by the respondent and held it is sufficient for the court to set aside the order of the High Court. On the requirement of full and fair disclosure the Federal Court referred to the English case "*The Hagen*" [1908] P 189 which dealt with application for service out of jurisdiction under O. 11 r. 1(j) of the RSC and said this:

As Farewell LJ said in "*The Hagen*" [1908] P 189 at p. 201:

> During these present sittings Vaughan Williams LJ and myself have on more than one occasion had to consider O. XI and we have had many authorities discussed and fully considered by the Court, and the conclusion to which the authorities led us I may put under three heads. First we adopted the statement of Pearson J in *Societe General de Paris v. Dreyfus Brothers* ([1885] 29 Ch D 239, at p. 242) that 'it becomes a very serious question, and ought always to be considered a very serious question, whether or not, even in a case like that, it is necessary for the jurisdiction of the Court to be invoked, and whether this Court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think *this Court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction.*' The second point which we considered established by the cases was this, that, if on the construction of any of the subheads of O. XI there was any doubt, it ought to be resolved in favour of the foreigner; and the third is that, *inasmuch as the application is made ex parte, full and fair disclosure is necessary, as in all ex parte applications, and a failure to make such full and fair disclosure would justify the Court in discharging the order,* even although the party might afterwards be in a position to make another application.

...

As Scott LJ said in *George Monro Ltd. v. American Cyanamid and Chemical Corp.* [1944] 1 KB 432 the headnote to which at p. 433 I now set out:

> *Service of a writ out of the jurisdiction is an interference with the exclusive jurisdiction of the sovereign power of the State where the service is effected.* As a matter of international comity such service should not be allowed unless it is clearly within both the letter and the spirit of O. XI r. I.

This statement of the law was reaffirmed by Diplock LJ in *Mackender and Ors. v. Feldia and Ors.* [1967] 2 QB 590 and I quote from the headnote at p. 591:

> The jurisdiction which the High Court claims over defendants who are neither present nor ordinarily resident in this country, when it grants leave under RSC O. 11 is a claim *which conflicts with the general principles of comity between civilised nations, and it is one which should be exercised with caution.* (emphasis added)

[25] The Federal Court in the case *Cantrans Services* (*supra*) adopted the principles in *"The Hagen"* (*supra*) which placed great emphasis on the need for court to be cautious where leave of the court is sought for service out of jurisdiction as such service is an interference with the exclusive jurisdiction of the sovereign power of the State where the service is effected.

[26] Thus, it is crucially important that the court has before it all relevant and material facts in deciding whether the jurisdiction of the court ought to be invoked for purpose of serving the writ out of its jurisdiction as it is a direct interference with the exclusive jurisdiction of a sovereign State.

[27] As stated above, it is not disputed that the arbitration agreement clause was not disclosed by the plaintiff at the application for leave stage. Had the said clause was disclosed, this court is of the view the *ex parte* order would most probably not be granted, based on the reasons stated below.

Service Of The Notice Of Writ To Be Served Out Of Jurisdiction, Writ Of Summons And Statement Of Claim

[28] The plaintiff's application for leave was made under O. 11 r. 6(2)(b)(ii) of the ROC 2012. In support of the application for leave, it was affirmed on behalf of the plaintiff as follows:

(i) plaintiff has a good cause of action against the first defendant and second defendant for breach of contract; and

(ii) the plaintiff's action is well within the jurisdiction of the Malaysian courts pursuant to cl. 18.9 of the *murabahah* facility agreement and cl. 11 of the personal guarantee agreement. Pursuant to the said provisions the parties had agreed the said agreements are governed by and shall be construed in accordance with the laws of Malaysia and to submit to the jurisdiction of the Malaysian courts. A copy of the *murabahah* facility agreement and personal guarantee agreement is attached as exh. A.

[29] Order 11 r. 6 of the ROC 2012 reads:

> 6. Service of notice of writ abroad through foreign governments, judicial authorities and Malaysian consuls or by plaintiff (O. 11 r. 6)

A (1) Where, in accordance with these Rules, notice of a writ is to be served on a defendant in any country with respect to which there subsists a Civil Procedure Convention providing for service in that country of process of the Court, the notice may be served:

(a) through the judicial authorities of that country; or

B (b) subject to any provision of the Civil Procedure Convention as to the nationality of persons who may be so served:

(i) through a Malaysian consular authority in that country; or

(ii) by the plaintiff or his agent.

C (2) Where, in accordance with these Rules notice of a writ is to be served on a **defendant in any country with respect to which there does not subsist a Civil Procedure Convention providing for service in that country of process of the Court**, the notice may be served:

D (a) through the government of that country, where that government is willing to effect service; or

(b) except where service through a consular authority or by the plaintiff or his agent is prohibited by the law of that country:

(i) through a Malaysian consular authority in that country; or

E (ii) by the plaintiff or his agent.

(emphasis added)

[30] With regards to service of notice of writ abroad, O. 11 r. 5 of the ROC 2012 provides:

F 5. Service of notice of writ abroad: General (O. 11 r. 5)

(1) Subject to the following provisions of this rule, Order 10, rule 1 and Order 62, rule 5 shall apply in relation to the service of a notice of a writ notwithstanding that the notice is to be served out of the jurisdiction.

G (2) **Nothing in this rule or in any order or direction of the Court** made pursuant to rule 5(1) **shall authorise or require the doing of anything in a country in which service is to be effected which is contrary to the law of that country**.

H (3) A notice of a writ which is to be served out of the jurisdiction need not be served personally on the person required to be served so long as it is served on him in accordance with the law of the country in which service is effected.

(emphasis added)

[31] *Vide* the plaintiff's affidavit of service in encl. 12 ("plaintiff's affidavit I of service"), it was affirmed on behalf of the plaintiff that:

(i) the plaintiff has appointed Messrs Al Tamimi & Co as their agent ("agent") for purpose of service of the writ of summons and statement of claim, notice of writ to be served out of jurisdiction and *ex parte* order (collectively referred to as "cause papers") in Bahasa Malaysia, English and Arabic on the first defendant and second defendant;

(ii) the agent has on 16 June 2019 served the cause papers on the first defendant and second defendant *via* two letters dated 9 June 2019. Both the defendants have acknowledged receipt of the cause papers on 16 June 2019. Both the letters are attached as exh. TWL2;

(iii) the agent has affirmed an affidavit of service dated 25 June 2019 ("agent's affidavit of service") at the Malaysian Consulate Office in Jeddah, Saudi Arabia. A copy of affidavit of service by agent is attached as exh. TWL3 to the plaintiff's affidavit of service; and

(iv) the agent's affidavit of service was affirmed by one Mustafa Sami A Abudawood ("Mustafa") who is a lawyer in the employment of the agent. Mustafa affirmed that on 16 June 2019 at 10.30am he attended at the address of service of first defendant and second defendant at No. 27, Beautat Business Park, Al-Shatei District, Kingdom of Saudi Arabia to serve the cause papers. Mustafa affirmed the cause papers were duly acknowledged receipt by the first defendant and second defendant who had duly endorsed with its/his signature on the agent's letter dated 9 June 2019 which is attached as exh. MSA-1.

[32] Order 11 r. 6(2) of the ROC 2012 allows service to be effected in the manner stated therein in country where there does not subsist a civil procedure convention providing for service of process of the court. It is to be noted that the deponents in the plaintiff's affidavit of service and the agent's affidavit of service did not affirm that in the country in which service of the cause papers is to be done, namely, Saudi Arabia, there is no civil procedure convention which governs service of process of the court and that the service was in accordance with O. 11 r. 6(2)(b)(ii) of the ROC 2012. Importantly there was no averment made by the plaintiff that service of the cause papers that was effected on both the defendants is in accordance with and not contrary to the law of Saudi Arabia (see O. 11 rr. 5(1) to (3) of the ROC 2012).

[33] In *Fiden Electrical Engineering Sdn Bhd v. Nippon Seiko KK & Ors* [2004] 7 CLJ 12; [2004] 7 MLJ 231 it was held that service of a writ is an exercise in judicial power and that such power can only be exercised within the territorial limits of the State over which the courts have jurisdiction. In other words, judicial power of one State cannot be extended or exercised in another independent State except with the consent of that State. By extension, the laws of the State (governing service of process of the court) in which service is to be effected must be strictly complied with.

[34] Thus, there is no cogent evidence that the cause papers were duly served on the defendants in accordance with the law of Saudi Arabia. As such, there is no cogent evidence that service of cause papers were duly effected and this court is compelled to set aside service of the same. As a consequential order, it is declared that notice of writ to be served out of jurisdiction, writ of summons and statement of claim were not served on the first defendant and second defendant.

Whether This Court Has Jurisdiction

[35] In order to determine the jurisdictional issue, the arbitration agreement clause need to be analysed to determine whether the arbitration agreement is mandatory or merely directory. At the outset it is pertinent to note that it is not disputed by the parties that the arbitration agreement clause is an arbitration agreement within the context of s. 9 of the Arbitration Act 2005.

[36] In considering the said issue, the true ambit of the arbitration agreement clause must be determined by reference to its own language. Reference may be made to decided cases in providing general guidelines but it is to be borne in mind that the decided cases are decisions made based on their own facts. Thus, decided cases are not to be taken as establishing the meaning that is to be assigned to the words used by parties to express themselves in a given case (see *Bauer (Malaysia) Sdn Bhd v. Daewoo Corporation* [1999] 4 CLJ 665; [1999] 4 MLJ 545).

[37] The plaintiff referred to *Lembaga Pelabuhan Kelang v. Kuala Dimensi Sdn Bhd & Another Appeal* [2010] 9 CLJ 532; [2011] 2 MLJ 606 to support their contentions that the word "may" found in cl. 18.8(b) allows them to refer the dispute to the court.

[38] In the case of *Kuala Dimensi* (*supra*), the arbitration agreement clause in the principal agreement provided:

> If any dispute or difference of any kind whatsoever shall arise between the Parties herein arising out of or in connection with this Agreement (either during the progress or after the completion or abandonment of the Development Works) it shall if possible be resolved amicably between the Parties. **Any such dispute or difference which cannot be resolved amicably may be referred to arbitration in accordance with this Agreement**.
>
> (emphasis added).

[39] Subsequently, the parties executed supplementary agreements which, *inter alia*, contained a submission to court jurisdiction clause which reads as follows:

> This Supplemental Agreement shall be governed and construed in all respects in accordance with the laws of Malaysia and *the parties hereto hereby submit to the jurisdiction of the Courts of Malaysia in all matters connected with the obligation and liabilities of the parties under this Supplemental Agreement.*
>
> (emphasis added)

The supplementary agreements categorically provide that in the event of conflict in the interpretation of the terms of the principal agreement and the supplementary agreements, the supplementary agreements prevail ("prevailing clause").

[40] The issue before the Court of Appeal in *Kuala Dimensi*'s case was this - upon a true construction of the arbitration agreement clause and the submission to court jurisdiction clauses, did the parties intend to abandon arbitration and instead to resort to litigation.

[41] It was held by the Court of Appeal the use of the permissive word "may" in the arbitration agreement clause could give rise to the abandonment of the discretion to refer to arbitration and to opt for litigation instead, as contractually agreed by the parties in the supplemental agreements through the submission to the court jurisdiction clause. In fact, the court held the discretion of the parties to refer their disputes to arbitration was subsequently displaced, compromised or abandoned when they expressly submitted to the jurisdiction of the court to litigate all matters connected with the obligation and liabilities of the parties.

[42] Thus, by the subsequent conduct of the parties as evident in the subsequent supplemental agreements it was clear the parties had reaffirmed their express predominant agreement to submit to the court's jurisdiction and had effectively abandoned arbitration. On the facts, it was the finding of the court that the arbitration agreement clause (in the principal agreement) and the submission to the court jurisdiction clause (in the supplemental agreements) were in conflict and by reason of the prevailing clause in the supplemental agreements, the latter prevailed.

[43] In the present case, the arbitration agreement clause and the submission to the court jurisdiction clause (discussed below) are in one single agreement, namely, the *murabahah* facility agreement, personal guarantee agreement and collaboration agreement. There was no supplementary agreement executed by the parties in relation to their agreement to refer their dispute to arbitration. There was no subsequent intention expressed in the said agreements by the parties to abandon arbitration and resort to litigation. Thus, the issue of abandoning arbitration as the mechanism to solve their disputes (as in the *Kuala Dimensi*'s case) does not arise.

[44] Reading the arbitration agreement clause in totality, this court is of the view the word "may" qualifies the parties option either to pursue the dispute if the parties could not resolve the dispute or not to proceed further, that is, the parties may choose to live with the dispute. Instead, if the word "shall" is used, it would take away that option from the parties as it would compel the parties to pursue the dispute further even though the parties may not want to do so. By the word "may", in the event any of the party choose to pursue the dispute, the party is contractually bound to resolve the dispute by way

of arbitration and not through litigation. Accordingly, even though the word "may" is used in the arbitration agreement clause, on the facts the arbitration agreement, it is intended to be construed as mandatory and not merely directive.

[45] The plaintiff cited the case *Westbury Tubular (M) Sdn Bhd v. Ahmad Zaki Sdn Bhd & Ors* [2001] 5 CLJ 67 to support their position. In the cited case the High Court held due to the words "may be referred to arbitration" found in the arbitration agreement clause, there is no compulsion on the part of the plaintiff to refer the disputes to arbitration.

[46] It is to be noted the governing law on arbitration then was the Arbitration Act 1952 where under s. 6 of the same the court had a discretion whether or not to grant stay. Whereas the governing law now is the Arbitration Act 2005. As discussed below, under s. 10 of the Arbitration Act 2005 it is now mandatory on the court to grant stay where the matter before it is the subject of an arbitration agreement unless the arbitration agreement is null and void, inoperative or incapable of being performed. It is pertinent to note that the approach of the court with regards to arbitration agreement is to hold the parties to their voluntary and consensus to arbitrate their dispute especially so when the agreement to arbitrate is clear and certain. In *Malaysian Newsprint Industries Sdn Bhd v. Bechtel International Inc & Anor* [2008] 1 LNS 222; [2008] 5 MLJ 254 where it was held that:

> The parties are at liberty to decide on how to word the arbitration agreement provided it is clear and certain (*Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Pat (t/a Juta Bena)*). The agreement to arbitrate is just like a contract and it must be clear and certain. It will be construed to be void for uncertainty if its meaning is so ambiguous that it is incapable of being construed to give the agreement a certain degree of certainty. *The courts will try to resolve the ambiguity that exists within the agreement, where possible, in order to support the parties in their intention to refer their dispute to arbitration.* A classic example would be the case of *Mangistaumunaigaz Oil Production Association v. United World Trade Inc* [1995] 1 Lloyd's Rep 617 where the arbitration agreement stipulated that, 'Arbitration, if any, by ICC rules in London'. It was argued that the phrase 'if any' rendered the arbitration agreement too vague. But the judge disagreed and held that the phrase 'if any' was meaningless and thus could be ignored. Alternatively the judge held that that phrase could be construed as an abbreviation for 'if any dispute arises'. On either conclusion, the court held that the arbitration clause was not uncertain. In sharp contrast would be the case of *JF Finnegan Ltd v. Sheffield City Council* [1989] 43 Build LR 124; [1989] 5 Const LJ 54 where the court held that a clause in the contract that it was a matter for further discussion as to whether disputes under the contract were to be referred to arbitration was said to be too vague.

> It must be borne in mind that no specific words or form are required to constitute an arbitration agreement. What is certain is this. That the agreement to refer disputes to arbitration is essential and the intention of the parties to arbitrate must be clear and unequivocal. *Another certainty is this. That where there is a clear intention to arbitrate, the court will give effect to the agreement even if the clause is incomplete or lack certain particulars* (*Woh Hup (Pte) Ltd v. Property Development Ltd* [1991] 2 CLJ 1260; [1991] 4 CLJ (Rep) 1174; [1991] 3 MLJ 82).
>
> (emphasis added)

[47] In *TNB Fuel Services Sdn Bhd v. China National Coal Group Corp* [2013] 1 LNS 288; [2013] 4 MLJ 857 the court said this:

> [24] The present form of s. 10 of the Arbitration Act 2005 is the result of the amendment to that section which came into force on 1 July 2011 (Act A1395). It is generally accepted that the effect of the amendment is to *render a stay mandatory* unless the agreement is null and void or impossible of performance. The court is no longer required to delve into the facts of the dispute when considering an application for stay. Indeed, following the decision of the court in *CMS Energy Sdn Bhd v. Poscon Corp, a court of law should lean towards compelling the parties to honour the 'arbitration agreement' even if the court is in some doubt about the validity of the 'arbitration agreement'*. This is consistent with the 'competence principle' that the arbitral tribunal is capable of determining its jurisdiction, always bearing in mind that recourse can be had to the High Court following the decision of the arbitral tribunal.
>
> (emphasis added)

[48] Guided by the above authorities this court is of the view on the true construction of the arbitration agreement clause it is clear that in the event the parties failed to settle the dispute, controversy and claim with reasonable commercial endeavours and decided to pursue the dispute, controversy and claim further, the parties had consciously consented to resolve the said dispute by way of arbitration. The plaintiff is accordingly obliged to refer the dispute (as in the instant action) to arbitration.

Whether The Submission To The Court Jurisdiction Clause Negates The Arbitration Agreement Clause

[49] It is argued by the plaintiff that in light of the parties agreement to submit to the jurisdiction of the Malaysian court, this court has the jurisdiction to hear the dispute between the parties.

[50] The governing law clause is found in cl. 18.9 of the *murabahah* facility agreement and cl. 6.7 of the collaboration agreement. Both the said provisions are identical and provide as follows:

A 18.9 Governing law

This Agreement is governed by and shall be construed in accordance with the laws of Malaysia and the parties hereto agree to submit to the jurisdiction of the Courts in Malaysia.

B The governing law clause will be hereinafter referred to as the "submission to the court jurisdiction clause".

[51] Clause 11 of the personal guarantee agreement which the plaintiff cited as the submission to the court jurisdiction clause states:

11. Governing Law

C This Guarantee is governed by and, shall be construed in accordance with the laws of Malaysia.

[52] It is to be seen that while the submission to the court jurisdiction clause is clearly and expressly stated in the *murabahah* facility agreement and
D the collaboration agreement, there is no such clause found in the personal guarantee agreement. Clause 11 of the personal guarantee agreement is the governing law clause which merely incorporates the parties' agreement for the laws of Malaysia to be the governing law of the personal guarantee agreement. Thus the issue whether the submission to the court jurisdiction clause negates the arbitration agreement is not relevant to the personal
E guarantee agreement.

[53] On this issue reference is made to the High Court case *Hamidah Fazilah Sdn Bhd v. Universiti Tun Hussein Onn Malaysia (UTHM)* [2016] 1 LNS 1170; [2017] 7 MLJ 274. In *Hamidah Fazilah*'s (*supra*) case, the arbitration
F agreement clause is found in cl. 67 of the design and build contract whereas the submission to the court jurisdiction clause is found in cl. 70 which states as follows:

70.0 LAW GOVERNING THIS CONTRACT

70.1. This Contract shall be governed by and construed according to the
G law of Malaysia and the parties irrevocably submit to the exclusive jurisdiction of the courts of Malaysia.

70.2 The Contractor bind himself to acknowledge and accept as final in all respects within the country of domicile of the Contractor or elsewhere, any decision or award of an Arbitrator or judgment in any court of
H Malaysia in relation to any dispute between the parties under this Contract.

70.3 This clause shall apply in all respects in case any such decision award or judgment is to be enforced in the courts of the country of domicile of the Contractor or elsewhere in any manner ...

I **[54]** The plaintiff in the cited case contended that the parties by agreeing to submit to the exclusive jurisdiction of the courts of Malaysia would be deemed to have abandoned arbitration altogether in favour of litigation. In support of its contentions the plaintiff referred to the case of *Kuala Dimensi*

where the Court of Appeal held there is a conflict in the interpretation of the arbitration agreement clause and the submission to the court jurisdiction clause in the subsequent supplemental agreements and therefore effect could not be given to enable both the provisions to function harmoniously. The High Court in the case *Hamidah Fazilah* rejected the said contention and opined:

> [53] I find no contradiction between the applicability of the Arbitration Clause in the said Contract Document in Clause 67.0 and the Clause 70.0 in relation to the submission of parties to the jurisdiction of the High Court.
>
> [54] As we are all aware, when it comes to certain reliefs in aid of arbitration and more so when it comes to setting aside and enforcement of an arbitral award, the parties seeking such reliefs would still have to come to the relevant Court for assistance. To avoid bickering over what law to apply and which court to apply for such reliefs, parties have addressed this issue at the outset in governing law clause. As both the parties are incorporated in Malaysia and carrying out their business here and as the Project is here, it makes every sense for the laws of Malaysia to apply. *Parties have agreed to submit to the exclusive jurisdiction of the Courts of Malaysia where there is a need to come to the Malaysian Courts to apply for interim measures such as an injunction for instance under section 11 Arbitration Act 2005 or for setting aside the Award under section 37 or to refer a question of law under section 42 or under section 38 for enforcement of the arbitral award.*
>
> ...
>
> [56] Where a harmonious interpretation is possible in an apparent contradiction at first reading, that interpretation is to be preferred lest the baby is thrown out together with the water in the bath tub. …
>
> [57] This is clearly a case where a holistic and harmonious approach is to be followed, giving effect to the clear intention of the parties to resolve all matters arising out of or in connection with the Contract to arbitration. At the same time parties affirm that where they have to approach the Court to aid and assist them in the instances set out above, they would then submit to the exclusive jurisdiction of the Malaysian Courts.
>
> (emphasis added)

[55] I would adopt the above approach and reasoning of the learned judge. Having considered the arbitration agreement clause and the submission to the court jurisdiction clause, this court is of the view that both the said provisions are able to function harmoniously in order to give effect to the intention of the parties to arbitrate their dispute and whenever the need arises, to seek the court assistance for, among others, any of the interim measure stated in s. 11 of the Arbitration Act 2005.

Whether The Arbitration Agreement Clause Bars The Plaintiff From Instituting Court Action

[56] The plaintiff referred to the case *Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Pat t/a Juta Bena* [1996] 1 CLJ 231 and reproduced in their written submission the following paragraph found at p. 237 of the judgment:

> At common law, a prior agreement between contracting parties to refer their disputes to arbitration did not operate to bar either of them from instituting proceedings in the ordinary Courts. Neither did such a clause preclude the Court from entertaining a suit filed in breach of the contract to arbitrate.

[57] Premised on the above decision it is argued this court is not precluded from hearing the plaintiff's claim despite the existence of the arbitration agreement clause. It is obvious that the plaintiff chose not to reproduce the entire paragraph that is quoted, in particular the succeeding sentence thereafter which is of significance to the issue herein. The entire paragraph is reproduced below:

> At common law, a prior agreement between contracting parties to refer their disputes to arbitration did not operate to bar either of them from instituting proceedings in the ordinary Courts. Neither did such a clause preclude the Court from entertaining a suit filed in breach of the contract to arbitrate. **However, the Court could, in the exercise of its discretion stay an action and require a plaintiff to adhere to the obligation voluntarily undertaken to go to arbitration**. The judicial philosophy behind this approach is based upon sound principle. It is this. Since consent cannot confer jurisdiction upon a Court which has none, there can be no consensual ousting of a Court's jurisdiction to hear and determine disputes between litigants. See, *Inter Maritime Management Sdn Bhd v. Kai Tai Timber Co Ltd, Hong Kong* [1995] 4 CLJ 164; [1995] 1 MLJ 322.
>
> (emphasis added)

[58] The discretion mentioned in the said paragraph is in the context of s. 6 of the Arbitration Act 1952 as the said case relates to the appellant's application to stay the court action pending arbitration of dispute. As discussed in paras. 44 to 45 above, under s. 10 of the Arbitration Act 2005 it is mandatory on the court to grant stay where the matter before it is the subject of an arbitration agreement unless the arbitration agreement is null and void, inoperative or incapable of being performed. Thus, under the prevailing law and the approach adopted by court in giving effect to arbitration agreement (where parties has consciously and voluntarily consented to provide mandate to the arbitrator to conduct the arbitration and deal with their disputes), the plaintiff's reliance on the case *Tan Kok Cheng* (*supra*) is misconstrued and misplaced.

Whether There Is A Dispute Between The Parties In The Context Of The Arbitration Agreement Clause

[59] As stated above, the plaintiff took the position there is no dispute because the defendants *vide* their letters have admitted to the arrears due to the plaintiff. The plaintiff cited the case *Tan Kok Cheng* to support their position. In the said case, the appellant's application under s. 6 of the Arbitration Act 1952 to stay the court action pending arbitration of the contractual dispute was dismissed by the High Court. The said s. 6 provides as follows:

> 6. If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the Court to stay the proceedings, and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, **may** make an order staying the proceedings. (emphasis added)

[60] In their written submission (encl. 22) at para. 25, the plaintiff reproduced a paragraph of the judgment of the Federal Court in *Tan Kok Cheng*'s case to support their position. On careful reading of the judgment, the paragraph quoted (see p. 25 of encl. 22) is actually the written judgment of the High Court and not that of the Federal Court. It was held by the Federal Court that the High Court Judge had applied the wrong test and asked himself the wrong question when he held that there was no *bona fide* dispute between the parties. It was further held a dispute or difference, whether *bona fide* or not, would suffice. The Federal Court allowed the appeal by the appellant (against the decision of the High Court dismissing the appellant's application for a stay pending reference to arbitration) and set aside the order of the High Court.

[61] Currently the law governing arbitration agreements and arbitral proceedings is the Arbitration Act 2005 which repealed the Arbitration Act 1952. Section 10 of the Arbitration Act 2005 provides as follows:

> 10. Arbitration agreement and substantive claim before court
>
> (1) A court before which proceedings are brought in respect of a **matter** which is the **subject of an arbitration agreement shall**, where a party makes an application **before taking any other steps in the proceedings, stay** those proceedings and **refer the parties to arbitration** unless it finds that the agreement is null and void, inoperative or incapable of being performed
>
> (2) The Court, in granting a stay proceeding pursuant to subsection (1), may impose any conditions as it deems fit.
>
> (emphasis added)

[62] In the case of *Hamidah Fazilah* the learned judge discussed the amendment made to s. 10 of the Arbitration Act 2005 and the relevant authorities:

> [45] It must be noted that there was also a further amendment made to section 10 Arbitration Act 2005 such that whilst previously the Court has to determine if there was a genuine dispute to be referred to arbitration, now the test is just whether or not there is a matter within the scope of the Arbitration Agreement that is to be referred to arbitration.
>
> [46] Thus in *KNM Process Systems Sdn Bhd v. Mission Biofuels Sdn Bhd* [2013] 1 CLJ 993; [2012] MLJU 839 it was highlighted this significant difference leaning towards upholding an arbitration agreement and correspondingly a stay of court proceedings would ordinarily be granted:
>
> > [16] It is also evident with the amendment that it is now mandatory on the court to grant stay where the matter before it is the subject of an arbitration agreement unless the arbitration agreement is, in the words of the statute, 'null and void, inoperative or incapable of being performed.
> >
> > [17] It is no longer possible to argue that in respect of the controversy between the parties there is no 'dispute' with regard to the matter to be referred to arbitration, which is a test which invites unnecessary ambiguity and requires the court to determine whether there is a 'dispute' between the parties not dissimilar to the function performed by the court in determining whether there is a triable issue in a summary judgment application. *The test is now simpler test of whether the matter before the court is the subject of an arbitration agreement or otherwise. To decide on the simpler test, it will become a matter of construction of the relevant arbitration agreement, where it exists*.
>
> (emphasis added)
>
> [47] In the *Press Metal Sarawak Sdn Bhd*'s case (*supra*) the Federal Court explained as follows:
>
> > [28] The present s. 10(1) of the 2005 Act (as amended vide Act A1395 which came into force on 1 July 2011 (the 2011 Amendment)) reads:
> >
> > > 10(1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

[29] Prior to the 2011 Amendment, s. 10(1) provided as follows:

> 10 Arbitration agreement and substantive claim before court:
>
> (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds:
>
> (a) that the agreement is null and void, inoperative or incapable of being performed; or
>
> (b) *that there is in fact no dispute* between the parties with regard to the matters to be referred.

[30] Paragraph (b) of s. 10(1) was completely repealed by the 2011 Amendment. *Previously, there must be in existence a dispute between the parties with regard to the matter to be referred*, before a court is empowered to make an order under s. 10(1). With the deletion of para (b) the only remaining exception under the present s. 10(1) is that the arbitration agreement between the parties is null and void, inoperative or incapable of being performed.

...

[33] What the court needs to consider in determining whether to grant a stay order under the present s. 10(1) (after the 2011 Amendment) is whether there is in existence a binding arbitration agreement or clause between the parties, which agreement is not null and void, inoperative or incapable of being performed. *The court is no longer required to delve into the details of the dispute or difference* (see *TNB Fuel Services Sdn Bhd*). In fact *the question as to whether there is a dispute in existence or not is no longer a requirement to be considered in granting a stay under s. 10(1). It is an issue to be decided by the arbitral tribunal*.

(emphasis added)

[63] Thus under s. 10 of the Arbitration Act 2005, this court is not required to critically examine the facts in order determine whether there is a dispute, claim or controversy within the context of the arbitration agreement clause. Accordingly, the dispute or claim as to the defendants' admission on their repayment obligation in relation to the arrears due to the plaintiff and/or the defendants' claim that the *murabahah* facility agreement, personal guarantee agreement and collaboration agreement contravene the laws and/or regulation in Saudi Arabia is a matter to be determined by the arbitral tribunal.

Whether The Arbitration Agreement Is Inoperative Or Incapable Of Being Performed

[64] Under the arbitration agreement clause, the parties have agreed that reference of any dispute, controversy or claim to the GCC Commercial Arbitration Centre in Bahrain shall be deemed to be a submission to arbitration within the meaning of the International Commercial Arbitration Law (Decree No. 9 of 1994).

[65] The plaintiff produced (in their bundle of authorities) the Bahrain Arbitration Law No. 9/2015 which sets out art. 1 to art. 8 of the said law. Pursuant to art. 8, it is contended by the plaintiff that "the International Commercial Arbitration Act Law (Decree No. 9 of 1994) as mentioned in the dispute resolution clause have already been abrogated which rendered the same inoperative or incapable of being performed in that should there be likelihood of any disagreement in respect of the appointment of arbitrators between the parties, there will be no governing rules to regulate the impasse.".

[66] Having perused the Bahrain Arbitration Law No. 9/2015, this court made the following conclusion:

(i) Bahrain Arbitration Law No. 9/2015 promulgates the new law on arbitration;

(ii) pursuant to art. 1(1) of the Bahrain Arbitration Law No. 9/2015, the provisions of the UNCITRAL 1985 Model Law on International Commercial Arbitration (the "UNCITRAL Law") shall apply to all arbitration whatever the nature of the legal relationship of the disputes between parties, if the arbitration takes place in Bahrain or abroad and the parties agreed to be subject to the UNCITRAL Law;

(iii) pursuant to art. 1(2) of the Bahrain Arbitration Law No. 9/2015, the provisions of the UNCITRAL Law shall apply to all arbitration beginning after the said arbitration law's entry into force regardless of whether the arbitration agreement was concluded before such entry into force; and

(iv) the effect of the promulgation of Bahrain Arbitration Law No. 9/2015 is, among others, the International Commercial Arbitration Law promulgated by Decree No. 9 of 1994 is repealed (see art. 8 of the Bahrain Arbitration Law No. 9/2015).

[67] Under the UNCITRAL Model Law on International Commercial Arbitration, Chapter III, Composition Of Arbitral Tribunal sets out provisions in relation to the number and appointment of arbitrators. Among others, it is provided that the parties are free to agree on a procedure of appointing the arbitrator or arbitrators. In the event parties fail to agree, art. 11(3), (4) and (5) sets out the mechanism to address such failure.

[68] Thus, the plaintiff's allegation there will be no governing rules to regulate the impasse of any disagreement in respect of the appointment of arbitrators between the parties (because the International Commercial Arbitration Law promulgated by Decree No. 9 of 1994 is repealed) is simply misleading. While it is true the International Commercial Arbitration Law promulgated by Decree No. 9 of 1994 is repealed/abrogated (by the Bahrain Arbitration Law No. 9/2015), it is readily replaced with the UNCITRAL Law which governs arbitration that takes place in Bahrain. Accordingly, the plaintiff's contentions that the arbitration agreement is inoperative or incapable of being performed is unfounded and untenable. It is absurd to even think for a moment that the International Commercial Arbitration Law promulgated by Decree No. 9 of 1994 is repealed without a new law to substitute it when it involves international commercial arbitration where international parties consent and opt for Bahrain to be the appropriate jurisdiction for purpose of resolving their commercial disputes, just like the plaintiff and defendants in this instant action.

Conclusions

[69] Premised on the aforesaid reasons, the court made the following orders:

(i) the *ex parte* order is set aside;

(ii) services of the notice of writ to be served out of jurisdiction, the writ of summons and statement of claim on the defendants are set aside;

(iii) declaration that the notice of writ to be served out of jurisdiction, the writ of summons and statement of claim were not served on the defendants;

(iv) the dispute in this action be referred to arbitration. In light of the orders made at para. (i) - (iii) and that the writ of summons has expired in August 2019, an order to stay this instant action pending the arbitration of the dispute, claim or controversy is not warranted; and

(v) this court has no jurisdiction on the subject matter of the plaintiff's claim in this action.

[70] Costs of RM8,000 awarded to the defendants.